Abstract

NO. 67-95

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

94 I.A.3/52

DOROTHY GOFF, Plaintiff-Appellee, vs. MARVIN GOFF, Defendant-Appellant.	)	Appeal from the Circuit Court for the 16th Judicial Circuit, Kendall County, Illinois.

MR. JUSTICE SEIDENFELD DELIVERED THE OPINION OF THE COURT:

The plaintiff, Dorothy Goff, filed suit for divorce against her husband, Marvin Goff, Defendant thereafter filed a counterclaim and upon a trial without a jury, the trial court found for the plaintiff on her complaint and denied the counterclaim of the defendant. A decree was entered which found that the plaintiff was free from fault and ordered the defendant to execute and deliver to the plaintiff a deed conveying his undivided one-half interest in the marital home which was held in joint tenancy as settlement in gross in lieu of alimony; allowed defendant to keep a certain joint tenancy bank account which he had withdrawn; awarded the unpaid balance on a certain bearer note to defendant, and further, ordered the defendant to pay $30.00 a week to the support of one minor child.

From that portion of the decree which awarded the plaintiff the undivided one-half interest of the defendant in the marital home to the plaintiff as settlement in gross in lieu of alimony and the award of child support the defendant appeals.

During the marriage, both the husband and wife have worked.

Defendant, at the time of the divorce, was earning approximately $100.00 per week. Plaintiff was earning approximately $300.00 to $350.00 per month. During the marriage the wife, from her own earnings, purchased the major part of the children's clothes, household items and the furniture for the home.

The record reflects that the defendant, on at least three separate occasions, left the marital home, leaving the family without support. Further, the defendant was out of work for eight months during 1954 and did not support his family for one-half years in 1959 and 1960 when the defendant lived in Aurora and the rest of the family resided in Memphis, Tennessee.

The marital home was purchased in 1957 for $7,900.00, with a down-payment of $3,300.00. Thereafter, in 1960, the mortgage was increased to $8,500.00 due to improvements made upon the home. The mortgage, at the time the decree was entered, was approximately $5,600.00.

The defendant contends that the decree conveying his undivided one-half interest in the home to the plaintiff waserror because there were no allegations of special equities in the complaint, and further, that none were proved. The decree provided that the plaintiff would receive the undivided one-half interest of the defendant in the marital property as a property settlement in gross in lieu of alimony "because of special equities of said plaintiff in the property."

Section 17 of the Divorce Act (Ill. Rev. Stat. 1965, Chap. 40, Sec. 18) provides:

> "Whenever a divorce is granted, if it shall appear to the court that either party holds the title to property equitably belonging to the other, the court may compel conveyance thereof to be made to the party entitled to the same, upon such terms as it shall deem equitable."

There is no doubt that under the aforesaid Section 17 of the Divorce Act that for a conveyance to be made special equities must be alleged and proven. However, Section 18 of the Divorce Act which provides in part (Ill. Rev. Stat. 1965, Ch.40, Sec. 19):

> "When a divorce shall be decreed, the court may make such order touching the alimony and maintenance of the wife or husband, the care, custody and support of the children, or any of them as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just. The court may order the husband or wife, as the case may be, to pay to the other party such sum of money, or convey to the party such real or personal property, payable or to be conveyed either in gross or by instalments as settlement in lieu of alimony, as the court deems equitable."(Emphasis supplied)

Allegations and proof of special equities required to sustain a conveyance of property under Section 17 of the Divorce Act are not required to sustain a conveyance as a property settlement in lieu of alimony under Section 18 of the Divorce Act. All that is required under Section 18 of the Divorce Act is that the court reasonably deem the conveyance an equitable one as a property settlement in gross in lieu of periodic payments of alimony. In Smothers vs. Smothers, 25 Ill. 2d 86, 87 (1962) where the house, the title of which was held in joint tenancy was awarded to the plaintiff-wife, the court said at page 87, in sustaining the award as equitable that:

> "The evidence shows defendant failed to support the plaintiff, that she worked, paid the bills at home and gave him money to put on the property. It appears that on the entire record an order for periodic alimony payments would not be feasible, and we think the award of the jointly owned real estate is justifiable under Section 18 of the Divorce Act even though not specifically prayed for in the complaint."

The Court has held the same in Persico v. Persico, 409 Ill. 608, 612 (1951) and Schwarz v. Schwarz, 27 Ill. 2d 140, 148-149 (1963).

Further, in Tuyls v. Tuyls, 21 Ill. 2d 192 (1961), where title to an apartment house which was held in joint tenancy was awarded to the plaintiff-wife, the court said at page 196:

> "The record indicates at least eighty percent of the original down-payment was furnished by the wife, that she contributed most of the family income during the marriage, and that whatever sums were received by defendant were largely devoted to his own pleasures. To allow defendant to share in this property under these circumstances would be to reward him for his unconscionable conduct ... The fairness of the present determination is further demonstrated by the fact that defendant is forever relieved of accounting for rents received by him from the Oswego and Aurora properties and from all future alimony claims."

The plaintiff claims that the majority of the moneys used for the down payment for the marital home purchased in 1957 were the result of her own labors and therefore the award of the one-half joint interest of the defendant to her as property settlement in gross in lieu of alimony was equitable. It is undisputed that the down payment made in 1957 was $3,300.00. $450.00 was money earned and saved by the defendant, $450.00 was money earned and saved by the plaintiff and $400.00 was a loan from the plaintiff's uncle. The dispute arises as to the source of the balance of $2,000.00 for the down payment. The plaintiff claims that the $2,000.00 was the profit from the sale of a home in Chicago and that the plaintiff made the down payment of the home in Chicago of $1,000.00 which was the result of a $750.00 Christmas bonus payable to her and $250.00 unemployment compensation payable to her. The additional $1,000.00 was appreciation of the value of the home when it was sold.

The defendant claims that the down payment for the home in Chicago was provided by himself. Without reiterating the testimony of the defendant at length, or the testimony which was elicited on cross-examination, the record supports the finding of the trial court that most of the funds which resulted in the $2,000.00 balance of the down payment of the marital home in 1957 originated in the plaintiff.

Therefore, the record fully sustains the trial court's conclusion that there were equities in favor of the plaintiff and the award to the plaintiff of the defendant's undivided one-half interest in the marital home as settlement in gross in lieu of alimony was proper.

Further, to show the equitable consideration of the trial court rendered to the defendant, the decree allowed him to retain, as his own property, the sum of $1,832.73 which he had withdrawn from a joint account of the plaintiff and defendant and, in addition, the decree awarded the defendant the unpaid balance of $1,373.96 on installment notes secured by a mortgage on certain property, which property had originally been purchased with a $500.00 down payment saved by the plaintiff.

The trial court in its proper discretion, determined that plaintiff was entitled to alimony and properly concluded that, based upon the past performance of the defendant in regard to support of the family, any award of periodic alimony to the plaintiff would be a nullity.

The second contention of the defendant that the award of $30.00 per week child support was excessive is moot as such child has now attained her majority.

The decree of the trial court is therefore affirmed.

AFFIRMED.

Abrahamson, P. J.; Moran, J. - Concur

No. 67-96

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- PHILLIP SHARP, Defendant-Appellant.	Appeal from the Circuit Court of Pulaski County, Illinois. Honorable George Oros, Judge Presiding.

Per Curiam:

The defendant was found to be a sexually dangerous person and ordered committed to the custody of the Director of Public Safety of the State of Illinois pursuant to judgment entered on the 7th day of November, A.D. 1966, by the Circuit Court of Pulaski County, Illinois, First Judicial Circuit. Subsequent thereto defendant filed two petitions of recovery in the Circuit Court of Pulaski County together with motion for appointment of counsel.

This is an appeal from an order of the Circuit Court of Pulaski County, Illinois, entered on June 9, 1967, dismissing defendant's petitions of recovery.

The issue is whether the trial court should have appointed counsel, impanelled a jury, and held a hearing on the defendant's petitions of recovery.

On April 12, 1967, the defendant filed his petition for recovery in the Circuit Court of Pulaski County alleging that he had recovered and specifically asking for a hearing before a jury, the preparation of psychiatric reports, and appointment of counsel to represent him in those proceedings.

On April 12, 1967, the special progress report of Groves B. Smith, M.D. was filed with the Circuit Clerk of Pulaski County. Additional special progress report of Groves B. Smith, M.D., reflecting an examination of defendant on April 25, 1967, was filed on May 2, 1967, with the Circuit Clerk of Pulaski County.

The State's Attorney of Pulaski County, Illinois, filed a motion to strike petition of recovery on behalf of the People of the State of Illinois, alleging that the allegations contained in the petition of recovery are premature, conclusions,

and self declarations on the part of the petitioner and asking that the petition of recovery be dismissed and that the court order that no similar petitions may be filed by the defendant until there are reasonable grounds to believe that sufficient recovery has occurred to entitle petitioner to a hearing.

The defendant filed an additional petition of recovery with the Circuit Court of Pulaski County on June 6, 1967, again alleging that he had recovered and was invoking the provisions for a recovery hearing as provided by statute and specifically citing authority indicating that he be given a hearing and a trial by a jury and that counsel be appointed, and requested that a hearing in accordance with the statutes be held.

A classification report pertaining to the defendant, prepared by Groves B. Smith, M.D., on January 11, 1967, was filed on June 6, 1967.

The defendant's petitions of recovery of April 12, 1967 and June 6, 1967 were dismissed by the Circuit Court of Pulaski County, Illinois, on June 9, 1967, without having appointed counsel to represent the defendant pertaining to the petitions, without having impanelled a jury to determine whether or not the defendant had recovered, and without having heard any testimony whatsoever pertaining thereto.

The Supreme Court of Illinois has specifically held that Ill. Rev. Stat. (1965) Chap. 38, Sec. 105-5, pertaining to the respondent's right to demand trial by jury and be represented by counsel, applies to applications for discharge under said Act (Ill. Rev. Stat., 1965, Chap. 38, Sec. 105-9). People v. Olmstead, 32 Ill 2d 306, 205 NE2d 625, 629; People v. Capoldi, 37 Ill 2d 11, 225 NE2d 634, 638.

Although the defendant's petitions of recovery are admittedly inarticulate in alleging facts showing that defendant has recovered, as the Supreme Court stated in People v. Olmstead, supra, "(t)he only statutory route to freedom from confinement is to establish his recovery under Section 9. It is inconceivable that such sole right should find a roadblock in the fact that the indigent defendant is inarticulate in the forms of law or that he does not have the affidavits of psychiatric specialists to support his application." In that case the Supreme Court stated further that the application for discharge met the requirements of Section 9 (Ill. Rev. Stat., 1965, Chap. 38, Sec. 105-9) and upon filing of the application for discharge the trial court

should have appointed counsel to represent the indigent defendant and should have impanelled a jury pursuant to defendant's jury demand, and held a hearing to determine if the defendant had recovered from the disability responsible for his original commitment.

We wish to thank the court appointed attorney for the defendant in this case for filing an excellent brief, without fee.

For the foregoing reasons, the judgment of the Circuit Court of Pulaski County, entered on June 9, 1967, is reversed and this cause is remanded to determine whether defendant has now recovered from the disability responsible for his original commitment.

Reversed and remanded.

PUBLISH ABSTRACT ONLY.

No. 67-88

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. CARL R. HOERNER, JANET C. HOERNER, BARRY S. HOERNER, MICHAEL R. HOERNER, JOHN C. HOERNER, and HAROLD LANDOLT, Chairman of the Madison County Board of Supervisors, Defendants-Appellants.	Appeal from the Third Judicial Circuit of Madison County, Illinois. Honorable Joseph J. Barr, Judge Honorable Fred P. Schuman, Judge.

Per Curiam.

Janet C. Hoerner and Carl R. Hoerner parents, and Carl R. Hoerner as father and next friend of Barry S. Hoerner, a minor child, Michael R. Hoerner, a minor child, and John C. Hoerner, a minor child, appeal from orders of the Circuit Court of Madison County, entered March 11 and August 11, 1966, finding the children neglected, the parents unfit, and placing legal custody in, and granting the Chief Probation Officer of Madison County power to consent to the adoption of said minor children pursuant to Chapter 37, Sec. 705-9 of the Smith Hurd Illinois Revised Statutes. Appellants point out and the State agrees that no summons was directed to Carl R. Hoerner and Janet C. Hoerner, parents of said minor children, as required by Section 704-3 of Chapter 37 of the Smith Hurd Illinois Revised Statutes and no guardian ad litem was appointed for said minor children as required by Section 704-5, Chapter 37, of said statutes. There appears no allegation that the parents were unknown, that they could not be found, nor that their address was unknown, although publications were made and certified there was no showing of mailing of notices to the parents.

The attorney for the appellants in oral argument stated that the appellants' appearance in the case had now been entered through him and requested that this matter be sent back to the trial court for a hearing on the merits. The State's Attorney of Madison County in oral argument has also requested that this matter be remanded to the Circuit Court of Madison County so that appellants can properly assert their rights there and so a guardian ad litem for said minors can be appointed as required by Section 704-5.

We therefore remand this cause to the Circuit Court of Madison County and direct that Court to vacate both the order on adjudicatory hearing and the dispositional order entered on March 11, 1966 and the order entered on August 11, 1966, and proceed in such manner as will allow appellants to assert their rights, and for the appointment of a guardian ad litem.

Remanded with directions.

PUBLISH IN ABSTRACT ONLY.

NO. 68-7

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

CLYDE ROBERSON, HELEN ROBERSON, HOWARD LAIRD and LUCILLE LAIRD, Plaintiffs-Appellees,	)	Appeal from the Circuit Court of Jefferson County.
vs.	)	Honorable Alvin Lacy Williams, Judge Presiding.
DAN MORGAN, Defendant-Appellant.	)	

Per curiam:

Defendant appeals from the decree of the Circuit Court of Jefferson County. The decree enjoins defendant, Road Commissioner of Elk Prairie Township, in Jefferson County, and his successors, from in any way altering, modifying or changing a drainage ditch therein described. No appearance was made, nor brief filed, by the plaintiffs.

When the party who prevails in the trial court does not appear or file a brief, this court is authorized to reverse and remand the case without further consideration or discussion, East Side Health District v. Village of Caseyville, 38 Ill. App. 2d 438, Cole v. Willhoft, 73 Ill. App. 2d 208. The issues here presented are complex, and involve questions of the defendant's exercise of discretion, the right and authority of defendant, as road commissioner, to change or improve drainage, and whether there is sufficient evidence of irreparable harm to support the granting of the injunction. Since plaintiffs did not see fit to file a brief to aid the court in the decision of the appeal, we invoke the above stated rule and reverse the decree.

The decree is reversed and the cause remanded to the Circuit Court of Jefferson County with directions to dismiss the cause.

Decree reversed and remanded with directions.

PUBLISH ABSTRACT ONLY

NO. 68-9

94 I.A.2 403-1

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

BETTY JANE MELVIN, Plaintiff-Appellee,	)	
vs.	)	Appeal from the Circuit Court of Winnebago County.
OLIVER V. MELVIN, Defendant-Appellant,	)	
and	)	
VERA L. OLTMANNS, Defendant.	)	

PRESIDING JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

On November 24, 1967, the plaintiff, Betty Jane Melvin, filed a complaint for divorce in the Circuit Court of Winnebago County that alleged that the defendant, Oliver V. Melvin had committed adultery with the other defendant, Vera L. Oltmanns. The complaint also stated that Melvin owned and operated a funeral home in Sterling, Illinois; owned numerous parcels of real estate in a subdivision called "Country Club Estates"; owned a home in joint tenancy with the plaintiff, and owned various stocks, bonds, bank

accounts and policies of insurance of substantial value. Paragraph 17 of the complaint alleged in part as follows:

> "17. The plaintiff alleges that unless the said defendant, Oliver V. Melvin, and the defendant, Vera L. Oltmanns are enjoined and restrained by this Honorable Court from associating and/or consorting together, and from being in the company of each other, that said defendants will continue to associate and consort together and to be in the company of each other and that any possibility of the plaintiff and the defendant, Oliver V. Melvin assuming their marital life, will be destroyed.
>
> Plaintiff further alleges that she has just cause and reason to, and in fact does, fear that in the event any notice is given to the defendants of an intention on the part of the plaintiff to apply to this Honorable Court for injunctive relief in the premises, the defendant Oliver V. Melvin will utilize the interval occurring between receipt of such notice and the hearing of this Honorable Court upon the merits of such application to sell, assign, transfer, pledge, mortgage, hypothecate, conceal, sequester, squander, dissipate or otherwise deal with or engage in transactions with regard to the above described properties and other of his assets, and to continue his association and consortion with the said Vera L. Oltmanns and that thereby the plaintiff will be deprived and defaulted of her right to look to and rely upon the said defendant, Oliver V. Melvin and the assets owned by him or in which he has an interest as a means for her support and maintenance, and accordingly plaintiff shows that the injunction for which a prayer is hereinafter made should issue without the giving of notice to the defendants or either of them thereof, and without bond..."

The complaint was verified and included as attached exhibits full legal descriptions of the parcels of real estate allegedly owned by the defendant. The prayer of the complaint requested an injunction to issue without notice or bond to enjoin the defendants from "consorting or cohabiting together" and to enjoin Melvin or his agents from in any way transferring the

the various parcels of real estate or disposing of any of the other assets. On the same day the trial court issued a temporary injunction without notice or bond in accordance with the prayer of the complaint.

On December 14, the defendant, Oliver V. Melvin, filed his answer to the complaint for divorce and a motion to dissolve the temporary injunction. That motion was denied after a hearing held on that day and Melvin has taken this interlocutory appeal from that order. The plaintiff has not appeared here, by brief or otherwise.

We recently had the opportunity to discuss temporary injunctions at considerable length in the case of Miollis v. Schneider, 77 Ill. App. 2d 420 (December, 1966). We pointed out that the law did not favor an injunction without notice since it was a drastic remedy to be granted only under extreme circumstances and was contrary to our adversary concept of justice. We further stated, at page 429, that:

> "In order to justify the issuance of injunction without notice, the sufficiency of the complaint is the test of the validity of the injunction order. The complaint must allege facts from which the chancellor can infer the need of protecting the plaintiff from undue prejudice arising from notice to the adverse party. The extraordinary character of the injunctive remedy requires that it be awarded only where the complaint shows on its face a clear right to relief."

Since that decision, Section 3 of the Injunction Act (Ill. Rev. Stats., 1967, Ch. 69, Sec. 3) has been amended to provide:

> "No court or judge shall grant a preliminary injunction without previous notice of the time and place of the application having been given the adverse party unless it clearly appears, from specific facts shown by the verified complaint or by affidavit accompanying the same, that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon."

The amendment codifies the necessity that the complaint or affidavit contain "specific facts" to justify the issuance of the injunction and, significantly, requires that the applicant show that "immediate and irreparable injury, loss or damage will result" if notice is served rather than mere undue prejudice.

The Injunction Act was further amended by the addition of a Section 3-1 that provides detailed requirements for a temporary restraining order.

The complaint before us does not contain "specific facts" to support the remedy sought. Although the plaintiff alleged that she "feared" that the defendant would dispose of the assets if notice was served upon him, she makes no attempt to allege facts to substantiate that fear. The restraining order itself is wholly lacking in those essentials required by Section 3-1 and gratuitously waives the requirement of bond as provided in Section 9 of the Act. The apparent reason for these multiple deficiencies is the belief of the trial court that the law in regard to temporary injunctions in divorce cases is different from that in all other cases. That belief is incorrect. The strictures of the Injunction Act and the case law on temporary injunctions in regard to notice and bonds apply to divorce cases

in the same manner as other civil cases. Dear v. Dear, _____ Ill. App. 2d ____; Daskal v. Daskal, 71 Ill. App. (2d) 471; Berenson v. Berenson, 34 Ill. App. 2d 376.

The complaint does not contain specific facts that show that the plaintiff would suffer immediate and irreparable loss if notice had been furnished to the defendant and we must conclude that the issuance of the injunction was improper. The order of the trial court denying the defendant's motion to dissolve the injunction is reversed, the injunction is dissolved, and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Seidenfeld and Moran, J.J. concur.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10924

Agenda No. 68-1

Cecil P. Olds, Joseph Cerar, Robert Goins, Lance Wright and Lawrence Meiklejohn, Members of the Board of Trustees of the Police Pension Fund of the City of Springfield, Illinois,

Plaintiffs-Appellees

vs.

Joseph Delarco and Elijah Neale,

Defendants-Appellants

Appeal from Circuit Court Sangamon County

CRAVEN, J., delivered the opinion of the court.

This is an appeal from a declaratory judgment order of the circuit court of Sangamon County construing section 3-111 of the Illinois Pension Code (Ill.Rev.Stat.1963, ch. 108 1/2, para. 3-111), commonly referred to as the "Downstate Police Pension Fund."

The first paragraph of this section was a codification into the Illinois Pension Code of a former statutory provision enacted earlier and placed in the Municipal Code in 1961 without any substantive changes (Ill.Rev.Stat.1959, ch. 24, sec. 894; Ill.Rev.Stat.1961, ch. 24, sec. 10-8-6). However, a second paragraph added to the section by amendment August 5, 1963, is the portion of the law involved

in this action.

The judgment order in this proceedings, brought by the Members of the Board of Trustees of the Police Pension Fund of the City of Springfield, declared that the later 1963 amendment of the Pension Code was applicable to two defendant police officers who previously had retired and had re-entered active police service prior to the amendment but thereafter retired, and required that there be five years of additional service after first retirement in order to be awarded an increase in rate of pension.

Section 3-111 of the Police Pension Fund Act of Illinois, applicable to the setting apart, formation and disbursement of a police pension fund in cities, villages and incorporated towns having a population of not more than 500,000 inhabitants, prior to its amendment effective August 5, 1963, provided:

> "Any policeman who has creditable service of 20 years or more and has reached age 50 and who is no longer in the service as a policeman, shall be entitled to a yearly pension equal to 1/2 of the salary attached to the rank he held on such police force for 1 year immediately prior to his retirement, payable from the police pension fund of the municipality; provided, that the pension shall be increased by 1% of such salary for each additional year of such service over 20 years, to a maximum limit of 60% of such salary."

This section was amended by an additional paragraph effective August 5, 1963, which provides:

> "No retired policeman who re-enters service as a policeman after having retired and who is receiving a pension shall, upon again retiring, be

entitled to a larger yearly pension than that received originally upon first retirement unless such policeman remains in police service for at least 5 years and makes contributions at the prescribed rate after which his pension shall be increased at the rate stated above for each year of service during reemployment up to the stipulated maximum."

Joseph DeMarco was appointed a police officer of the City of Springfield on November 1, 1934, and served as a policeman until June 30, 1959, when he retired and received a monthly pension of $258.66 from the Police Pension Fund. On April 16, 1963, he was reappointed to the police department and again retired on December 31, 1965, after reaching mandatory retirement age.

Elijah Neale was appointed a police officer of the City on June 15, 1936, and served as a policeman until November 31, 1957, when he retired and received $226 as a monthly pension from the Fund. On April 19, 1963, he was reappointed to the police department and again retired on July 15, 1964.

At the time of the second retirement of Neale (July 15, 1964), he applied for and was awarded a monthly pension from the Fund of $294.62, or one-twelfth of fifty-two per cent of the salary attached to the rank held by him for the year prior to his re-retirement. In January of 1966, his pension was reduced to his original pension of $226 per month. DeMarco, at the time of his second retirement, was awarded the same monthly pension awarded at his first retirement.

The basic issue before the court is whether or not the amendment to Section 3-111 of the Police Pension Fund is applicable to the defendants, limiting the amount of their pension to that received by them upon their original retirement, since on re-enlistment neither served an additional five years. Defendant-officers also seek to rely upon an alleged practice and custom of the Springfield Police Department by which a retired member could be permitted to return to duty for a one-year period and thereby be eligible to receive additional retirement benefits upon making additional and larger contributions to the Fund. Defendants contend that a number of members of the Springfield Police Department who had retired earlier had been returned to duty and became eligible for and did receive additional benefits upon retirement. Certain other defenses were presented, including the doctrine of equitable estoppel, because of their having resigned other positions they held in order to re-enter service.

After hearing evidence, without a jury, the circuit court entered its declaratory judgment order here appealed, holding that the amendment applied to defendants and limited the amount of their respective pensions.

3 The establishment of a pension system is the province of the legislature. An elaborate system of pension funds has been created in this state by the legislature. The terms and conditions upon which a public employee becomes a member or participant also

are prescribed in the statutes creating the fund. The contributions to be made and the requirements of eligibility for benefits, likewise, are within the legislative function. The legislature, in this case, has prescribed at what time and what amount of pension is payable. As was said in Sup v. Cervenka, 331 Ill. 459, 463, 163 N.E. 396 (1928):

> "While a pension act should be liberally construed to effect the object sought to be accomplished, yet if the legislative intention is obvious from the language used that intention must be made effective, and the judiciary will not be warranted in giving the act a meaning not embraced in it."

People ex rel. Campbell v. Swedeberg, 351 Ill. App. 121, 113 N.E.2d 849 (2d Dist. 1953), is to the same effect.

We find no ambiguity to this statute as amended nor any need to attempt to apply a strained construction to that which its words plainly state. The pension fund is a creature of the legislature. Its provisions as to eligibility may be modified, altered, revised and amended as the legislature sees proper. No vested right to benefits accrues to a member of the fund as to his rights to benefits under the applicable law at the time he enters service. Amendments made to such laws prior to his retirement are fully applicable to him. This matter was fully determined in Peeoy v. City of Chicago, 265 Ill. 78, 106 N.E. 435 (1914); and again in Bentel v. Foreman, 288 Ill. 106, 123 N.E. 270 (1919); and Blouch v. Ekstrom, 14 Ill. App. 2d 153, 144 N.E.2d 436 (2d Dist. 1957).

Had the legislature intended that the second paragraph added by the 1963 amendment was to apply only to policemen who retired subsequent to its adoption and thereafter reentered police service, it could have done so by adding only a few additional words. No such words are present, so that the plain meaning of the amendment makes it applicable in the instant case and requires five years' additional service before any additional benefits are payable. To so interpret this amendment does not make it retroactive, as the defendant-officers did not retire a second time prior to the effective date of the amendment but rather after the effective date. The amendment merely relates to antecedent events or facts which do not condemn it as retroactive legislation. Sipple v. University of Illinois, 4 Ill. 2d 593, 123 N.E.2d 722 (1955); United States Steel Credit Union v. Knight, 32 Ill. 2d 138, 204 N.E.2d 4 (1965).

The evidence on the issue of equitable estoppel fell far short of that which is required in such matters. Each of the defendants admitted that no representations of a higher pension were made to them, prior to their reappointment, by any member of the Board of Trustees of the Pension Fund. Nor was there any testimony that these officers quit higher-paying positions to their detriment based upon representations or acts of inducement of the municipal or quasi-municipal officials. Even had the mayor or members of the city council made such representations, these would not have estopped the Board of Trustees of the Police Pension Fund, as it is a separate legal entity from the city and elected city officials.

However, there appears no representations of any of these officials.

Defendants' claimed change of position, if any at all, appears to be based upon alleged practices of the Board in effect prior to the amendment. The evidence did show that on two, and possibly four, prior occasions the Board had awarded additional benefits to policemen retiring a second time after return to duty for a one-year period, prior to passage of the amendment. These prior actions of the Board do not create an estoppel or raise the rule of contemporaneous construction. The only prior construction shown to have been placed by this Board on the statute, as amended, was in the single case of awarding a higher pension to Neale, which the board later corrected. No representations were made by the Board prior to defendants' reappointment which induced them to re-enter service. No change of position or conduct of the Board relied upon by defendants has been shown.

2 The statute prescribing the police pension fund permits no discretionary powers to its "trustees." A pension fund is a public trust and must be administered by its trustees as a sacred fund for the benefit of all its eligible members as the legislature has prescribed its terms and conditions. Sympathy cannot be substituted for performance of its duties. The statute here under consideration, including all its provisions and amendments, clearly required five years' additional service upon re-entry into the service

after retirement. The judgment order of the circuit court of Sangamon County correctly declared the rights of the parties.

Judgment affirmed.

SMITH, P.J., and TRAPP, J., concur.

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

SHARON GIBBONS,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal from the Circuit
	)	Court 17th Judicial Circuit
WILLIAM GIBBONS,	)	Winnebago County
	)	
Defendant-Appellant.	)	

MR. PRESIDING JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

This appeal is taken from an order of the Circuit Court of Winnebago County wherein the trial court modified a decree of divorce to increase the child support payments. William Gibbons, defendant, contends that the evidence presented at the hearing did not show a sufficient change in the circumstances of the parties to justify a modification of the decree by increasing the child support payments.

Sharon Gibbons, the plaintiff, had obtained a divorce in July of 1966. The decree awarded custody of the three minor children to her and awarded child support in the amount of $30.00 per week, possession of the marital home, and in addition, ordered the husband to make all mortgage payments and to pay the taxes and

insurance on the home. In November of 1965 the husband and wife executed a note to Northern Illinois Corporation in the face amount of $2520.00, which note was secured by a chattel mortgage on the household furnishings and an automobile. The note provided for payments of $70.00 per month. From the date of the divorce until May of 1967, the defendant had made some payments on this note.

In May of 1967 the defendant filed a voluntary petition in bankruptcy. Defendant listed debts in excess of $7000.00, not including the mortgage on the home. The mortgage debt was re-affirmed. None of the other obligations, including the debt to Northern Illinois Corporation was reaffirmed and defendant has made no payments on them. Northern Illinois Corporation re-possessed the automobile which was in defendant's possession and, after negotiations with the plaintiff, substituted a new non-interest bearing note in the face amount of $500.00, providing for monthly payments of $25.00, which note plaintiff signed to avoid having the household furnishings repossessed.

Plaintiff, who had not been employed prior to securing her divorce, testified that she had three part-time jobs which brought her an average weekly income of about $50.00. She further testified that her earned income plus the child support payments she was receiving were insufficient to permit her to make the $25.00 monthly payments to Northern Illinois Corporation and to meet her other necessary living expenses. Plaintiff testified that in June of 1967 both the gas and electric utilities had been cut off

because of her indebtedness to the utility companies and that she had had to borrow money from her grandmother to pay these obligations so that the gas and electricity to the home could be reconnected.

Defendant testified that he sold hospital insurance and that at the time of the divorce he had an average net income of $500.00 per month. He further testified that since the divorce his income had decreased but that he had continued to make the child support payments and the mortgage payments in the amount of $109.93 which included principal, interest, taxes and insurance.

After hearing the evidence, the trial court modified the original decree of divorce to provide that defendant should make child support payments of $35.00 per week until the $500.00 obligation to Northern Illinois Corporation had been paid.

It is defendant's position that a decree of divorce may be modified to provide for additional support of a former wife and minor children only if a showing that their wants and necessities have increased since entry of the decree and that the divorced father's means have so improved as to enable him to contribute to such increased needs. Patterson v. Patterson, 28 Ill. App. 2d 76, 78. We do not agree with the defendant that the facts before us do not show such a sufficient change in circumstances of the parties as to justify a modification of the original decree. After the husband's adjudication as a bankrupt, the plaintiff, in order to retain possession of the necessary house-

hold furnishings, was required to enter into a new note with Northern Illinois Corporation and to agree to pay them $500.00 at the rate of $25.00 per month, which sum is beyond the means of the plaintiff. By filing his petition in bankruptcy, the husband relieved himself of the obligation to pay approximately $7,000.00 of debts, and in particular, relieved himself of the obligation to pay $70.00 to Northern Illinois Corporation monthly.

Section 18 of the Divorce Act (Ill. Rev. Stat. 1967, ch. 40, § 19) authorizes the court to modify those provisions of a divorce decree pertaining to support of children where changed conditions of the parties require it in reason and justice. The findings and order of the trial court on matters of this nature will not be reversed unless contrary to the manifest weight of the evidence. Kelleher v. Kelleher, 67 Ill. App. 2d 410, 414.

Although the decree of divorce makes no recital concerning the household furnishings, it does award to the plaintiff possession of the real estate. We read into this also the furnishings, for the use and benefit of the plaintiff and her three minor children. The defendant husband in filing the bankruptcy petition jeopardized his family's right to possession of the household furniture. We deem this a sufficient change in circumstances to justify the modification of the decree to require the husband to pay an additional $5.00 per week until such time as the debt secured by the chattel mortgage on all the household furnishings has been paid.

JUDGMENT AFFIRMED.

MORAN, J. and SEIDENFELD, J. . concur.

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